IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-451

LOUIS S. NELSON, et al.,

Petitioners,

vs.

THEODORE BUTLER,

Respondent.

LOUIS S. NELSON, et al.,

Petitioners,

vs.

BILLY GALLIGHER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioners, Louis S. Nelson, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed herein on March 6, 1978.

OPINION BELOW

The opinion of the Court of Appeals, holding prison officials might be found liable for monetary damages under the Civil Rights Act of 1871 (42 U.S.C. § 1983) for negli-

gent conduct which did not violate any clearly-established constitutional right, is unpublished and is attached hereto as Appendix A.

JURISDICTION

The Court of Appeals order denying the petition for rehearing and rejecting the suggestion for a rehearing *en banc* was filed on July 28, 1978, and is attached hereto as Appendix B.

The jurisdiction of this Court is invoked under Title 28, United States Code, sections 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether negligent failure to properly maintain machinery in a prison factory or to adequately train prisoners in the use of that machinery becomes actionable under the Civil Rights Act (42 U.S.C. § 1983) merely by alleging that such failure was "intentionally negligent"?

2. Whether prison officials can be held liable for monetary damages under the Civil Rights Act (42 U.S.C. § 1983) for injuries sustained by prisoners working with prison factory machines when prior appellate decisions have held that prisoner industrial accidents are not actionable claims under the Act?

STATEMENT OF THE CASE

On February 27, 1970, respondent Theodore Butler filed a complaint in the United States District Court for the Northern District of California seeking monetary damages under the Civil Rights Act (42 U.S.C. § 1983) for injuries allegedly sustained in the use of an industrial machine in

the San Quentin Prison furniture factory (CT 216).[1] Respondents Billy Galligher, Joseph L. Bohall, and John R. Beltran filed similar complaints in the District Court on July 9, 1971 (CT 223).[2] Petitioners' motion to dismiss the complaint in *Butler* was filed on March 30, 1972, while a similar motion to dismiss *Galligher* was filed on April 20, 1972 (CT 216, 223). Both motions were granted on August 4, 1972, with leave to amend being afforded (CT 216, 223).

The first amended complaint in *Galligher* was filed on September 1, 1972, while the first amended complaint in *Butler* was filed on September 5, 1972 (CT 1-7, 207-14, 216, 223). Petitioner's motion to dismiss in *Butler* was filed on December 18, 1972, while a similar motion in *Galligher* was filed on December 20, 1972 (CT 8-31, 217, 224).[3] Both motions were heard on March 23, 1973, at which time the cases were dismissed as to all "Does," and the applications to consider the complaints as class actions were denied. The remainder of the motions to dismiss were denied without prejudice, and the cases were ordered consolidated (CT 95, 217, 224). Petitioners' answer to the amended complaints was filed on April 2, 1973 (CT 996-113, 217, 224).

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[1]USDC No. C-70-436 WTS, which upon subsequent reassignment was renumbered C-70-436 SC, will hereinafter be referred to as *"Butler."*

All references to the Clerk's Transcript in the Court of Appeal will be abbreviated "CT."

[2]USDC No. C-71-1323 CBR, which upon subsequent reassignment became No. C-71-1323 WTS, and after a second reassignment became No. C-71-1323 SC, will hereinafter be referred to as *"Galligher."*

LeRoy Taylor was also a plaintiff during the initial stages, but the cause of action was later dismissed as to him for repeated failure to comply with discovery. This proceeding does not involve him.

[3]Respondents' motion in *Galligher*, identical to that filed in *Butler*, was not included in the record on appeal. This motion is not essential to resolution of the issues, however.

Trial by jury commenced on May 28, 1975, but on June 5 a mistrial was declared and the cause returned to the chief judge for reassignment (CT 221, 226-27). After reassignment, the District Court called for memoranda directed to whether the first amended complaints stated a cause of action under the Civil Rights Act, which memoranda were filed by the parties on July 1 (petitioners'), July 2 (respondents'), and July 17 (respondents' reply) (CT 222). On July 11, 1975, the cases were dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (CT 196, 222, 227). Respondents appealed (CT 197).

On March 6, 1978, the Court of Appeals filed its opinion reversing the District Court on the ground that the amended complaints stated a cause of action for intentional rather than negligent conduct (Appendix A). Relying principally on *Procunier v. Navarette,* ..... U.S. ....., 98 S.Ct. 855 (1978), petitioners filed a petition for rehearing and suggestion for rehearing *en banc* on March 20, 1978. On March 27, 1978, the Court of Appeals ordered respondents to file authorities disclosing any case law which established, prior to July 27, 1970, the constitutional rights asserted in the amended complaints.[4] Respondents memorandum was probably filed sometime

[4]In pertinent part, that order was as follows:

"The response shall be directed to the proposition set forth in the petition for rehearing that *Procunier v. Navarette,* ..... U.S. ....., U.S.L.W. 4144, holds that prison officials and employees are immune from suit where the conduct at issue did not violate, at the time it occurred, a clearly established constitutional right.

"The appellants are required to cite what authority they have in case law for the proposition that the alleged constitutional rights violated had been judicially established in 1969 and 1970, and particularly prior to July 27, 1970, which is the date of the last act or conduct charged against appellees (complaint of Bohall)."

near June 12, 1978.[5] Petitioners' petition for rehearing and suggestion for rehearing *en banc* was denied on July 29, 1978.

STATEMENT OF FACTS[6]

In the *Butler* amended complaint (CT 1-7; Appendix C), plaintiff Butler alleged that defendants—the Director of the California Department of Corrections, the Warden of the California State Prison at San Quentin, and various supervisory personnel of the San Quentin Prison furniture factory—had forced Butler, a state prisoner, to work in the furniture factory, using dangerous machinery which was in an unsafe condition. In the course of being required to use a machine (hand-jointer) for a purpose for which it was not intended, Butler received an injury to the tip of the little finger on his left hand in June or July, 1969. On November 26, 1969, Butler was injured a second time on the machine; this time losing the ring finger of his left hand at the first (end) joint. Butler alleged that defendants wilfully and maliciously compelled him to work on the dangerous machine, or that defendants' conduct was grossly negligent, and that such conduct caused his injury. He also alleged that by maintaining the furniture factory in such hazardous condition, defendants conspired to deny him constitutional rights. Butler sought $150,000 in compensatory damages and $100,000 in punitive damages.

[5]The order of March 27, 1978, required the response to be filed by April 12. This date was later continued to April 19. A cover letter from respondents' counsel to the Court of Appeals and transmitting the response was dated June 12, 1978.

[6]These "facts" are taken from the amended complaints which are found in the Clerk's Transcript in the Court of Appeal. The allegations, insofar as pertinent hereto, are essentially similar. The entire amended complaint in *Butler* is included as Appendix C; that in *Gallagher* as Appendix D.

In the *Galligher* amended complaint (CT 207-14; Appendix D), plaintiffs alleged that the same defendants had also forced plaintiffs, again San Quentin prisoners, to work in the furniture factory using dangerous machinery which was in an unsafe condition. Galligher was required to use a machine (hand-jointer) for a purpose for which it was not intended, and on May 11, 1970, received an injury which resulted in the loss of the middle finger of his left hand at the first (end) joint. After recovering from that injury, Galligher was reassigned to the same machine and on July 10, 1970, lost the entire fourth finger of his left hand. Another plaintiff, Bohall, while operating a table saw, injured his left thumb on June 3, 1970, and lost part of his right thumb on July 27, 1970. Plaintiff Beltran, while operating a radial saw, injured the ligaments of two fingers on his right hand on August 12, 1970. Plaintiffs alleged that defendants wilfully and maliciously compelled them to work on this dangerous machinery, or that defendants' conduct was grossly negligent, and that such conduct caused their injuries. They also alleged that by maintaining the furniture factory in such hazardous condition, defendants conspired to deny plaintiffs' constitutional rights. Each of the plaintiffs sought compensatory damages of $50,000 and punitive damages of $100,000 for their respective injuries.

Both suits were based upon the Civil Rights Act of 1871, and alleged violations of rights and equal protection, due process, and freedom from cruel and unusual punishment. The plaintiffs were allegedly "forced" to work in the furniture factory because:

> "refusal to do so resulted in both immediate disciplinary action and prospective adverse consequences. The immediate disciplinary action includes a twenty-three hour a day lock-up for an intermediate period of time extending to years in many cases, and loss of the sole source of earnings while in prison confinement. The prospective adverse consequences of refusing to work is a 'write-up' in the inmate's file regarding the disciplinary action, which can ultimately mean possible increase in a prisoner's sentence when his file is review by the Adult Authority." (*Butler* ¶ 6; *Galligher* ¶ 7)[7]

The precise conduct with which defendants were charged was that plaintiffs were:

> "compelled by defendants to work in the furniture factory at San Quentin Prison, at machines that were dangerous, hazardous and unsafe machines with full knowledge of the dangerous, hazardous and unsafe condition of the machines thereby inflicting cruel and unusual punishment . . ., depriving plaintiff[s] of equal protection of the laws and denying plaintiff[s] the right to due process of the law. Defendants maintained

[7]The "forced labor" aspect of the amended complaints is hardly compelling, as the following colloquy between respondents' counsel and the District Court judge during the proceedings of July 11, 1975, demonstrates:

> "THE COURT: One thing that appeared in the papers, it was indicated that these individuals are forced to work there?
>
> "MS. SOLADAY: Yes, Your Honor.
>
> "THE COURT: When I was at San Quentin, I had the impression that working in the shop was sort of a privilege and something that the prisoners wanted to do, because it gave them extra money and extra time, and it was something to do, as opposed to sitting in the yard doing nothing.
>
> "MS. SOLADAY: Your Honor, as we showed in the [aborted trial] evidence, in order to seek a favorable consideration for when you get out of prison, you have to show the proper attitude, and you have to comply with the law of the prison and the state.
>
> One of the laws is that you are to work, that is a state law of California. There are only certain jobs available, only ten percent of the people in the prison are employed by industries of the prison, so there are waiting lists of people for any kind of job. People are locked up on many occasions who do not have jobs."
>
> (Reporter's Transcript 5:24 to 6:18)

these dangerous, hazardous and unsafe conditions by failing and refusing to properly train those chosen to work in this facility, by failing and refusing to use the machines in a manner and for purposes for which they were designed, by failing and refusing to see that the machines were maintained and repaired by professional and competent maintenance personnel, by failing and refusing to heed the warnings and complaints of inmate-employees even after witnessing numerous and repeated injuries to prisoners and plaintiff[s] occurring because of the dangerous, hazardous and unsafe working conditions." (*Butler* ¶ 7; *Galligher* ¶ 8)

The conduct which the Court of Appeal apparently felt constituted an actionable tort under the Civil Rights Act was described by plaintiffs as follows:

> "Defendants exhibited a reckless disregard of the safety of plaintiff[s] and thereby breached their duties to plaintiff[s]. Defendants had actual knowledge of the dangers likely to ensue from a failure to furnish plaintiff[s] with safe and proper machines and by maintaining these dangerous, hazardous and unsafe conditions. That knowledge notwithstanding, defendants maliciously, recklessly, knowingly and willfully compelled plaintiff[s]to subject himself [themselves] to severe injuries and loss of limb[s] by forcing plaintiff[s] to work on such dangerous, hazardous and unsafe machines and under dangerous, hazardous and unsafe working conditions; by ignoring the hazardous working conditions which defendants knew existed in the furniture factory; and by refusing to heed the warnings of plaintiff[s] and of other inmates and of agents, servants and employees of defendants regarding those conditions and the numerous injuries caused thereby. Defendants' actions caused the accidents hereinbefore alleged to have occurred, with attendant injuries and damages, thereby denying plaintiff's right to be free from cruel and unusual punishment, denying him [them] due process of law." (*Butler* ¶ 9; *Galligher* ¶ 10)

After alleging that this same conduct alternatively constituted gross negligence (*Butler* ¶ 10; *Galligher* ¶ 11), it was also alleged that:

> "[D]efendants' intentional, affirmative and malicious conduct in compelling plaintiff[s] to work under these hazardous conditions constitutes an infliction of cruel and unusual punishment, violative of the Eighth Amendment of the United States Constitution. . . ." (*Butler* ¶ 11; *Galligher* ¶ 12)

It was further alleged that this conduct constituted a conspiracy (*Butler* ¶ 14; *Galligher* ¶ 14).

REASONS FOR GRANTING THE WRIT

Plaintiffs were allegedly injured while using machinery in a prison factory. They assert that these injuries to fingers are injuries to their civil rights. Defendants are now confronted with the prospect and burden of litigating a non-diversity industrial accident case in federal court.

In the opinion below, the Court of Appeals, conceded that negligent conduct was not actionable under the Civil Rights Act of 1871, following this Court's decision in *Procunier v. Navarette*, ... U.S. ...., 98 S.Ct. 855 (1978). But seizing upon plaintiffs' allegations to the effect that "defendants maliciously, recklessly, knowingly and willfully violated" plaintiffs' various rights, the Court of Appeals concluded that the amended complaints alleged *intentional* torts and were outside the structures of *Procunier v. Navarette*. In so doing, the Court of Appeals ignored the essential nature of the various acts alleged in the complaints and the historical construction of such

allegations in the law of torts, for the complaints herein allege nothing more than common industrial accidents which have traditionally been considered *negligent* torts. If all a plaintiff need do is allege that defendants were "intentionally negligent," then *Procunier v. Navarette* is completely emasculated.

Furthermore, prior to the decision of the Court of Appeals *herein,* all reported decisions of other Circuit Courts had held identical injuries to state prisoners to be nothing more than industrial accidents which did not constitute violations of the Civil Rights Act. A prior, unreported decision of *this same circuit* had previously reached the same conclusion. For the Court of Appeals to thus posit defendants' liability upon conduct which had been previously construed as *no violation* of the Civil Rights Act is a rejection of this Court's decision in *Procunier v. Navarette, supra,* 98 S.Ct. at 860-62.

Insofar as the decision of the Court of Appeals holds prison officials monetarily liable to state prisoners who are injured in prison industrial accidents, it conflicts with *Merz v. Pinto,* 343 F.Supp. 374, 375 (D.N.J. 1971), aff'd, 459 F.2d 1041 (3d Cir. 1972), and *Kent v. Prasse,* 385 F.2d 406, 407-08 (3d Cir. 1967), and with a previous similarly unreported decision of this same circuit in *Brown v. Procunier,* No. 73-1044 (9th Cir., February 26, 1974).[8] Certiorari should be granted herein to resolve a conflict between two panels of the Ninth Circuit and between this circuit and the other circuits.

[8]A copy of this opinion is printed as Appendix E.

ARGUMENT

I

THE OPINION OF THE COURT OF APPEALS REJECTS THIS COURT'S DECISION IN PROCUNIER v. NAVARETTE.

A. Negligence is not Converted into Intentional Conduct Merely by Adding Opprobrious Epithets

In the amended complaints, the plaintiff-prisoners alleged that defendants, prison employees and administrators, required them to work in a prison furniture factory and did so with the knowledge that the machines upon which the prisoners were to work were hazardous, dangerous and unsafe, and that defendants did not provide proper training, utilize the machines for their intended purposes, properly maintain the machines, or adequately respond to reports of unsafe machines. Although conceding that this Court's decision in *Procunier v. Navarette,* .... U.S. ...., ..., 98 S.Ct. 855, 862, had foreclosed liability under a negligence theory (Opinion, fn. 1), the Court of Appeals nevertheless held that a cause of action had been stated in intentional tort because plaintiffs had alleged that "defendants maliciously, recklessly, knowingly and willfully violated appellants' right against cruel and unusual punishment by subjecting them to forced labor under conditions resulting in the maiming of their hands" and thus "the complaints at issue cannot be fairly construed to allege merely ordinary negligence." But as this Court held in *Snowden v. Hughes,* 321 U.S. 1, 10 (1944), the mere addition of opprobrious epithets such as "willful" or "malicious" does not transform the acts alleged into intentional conduct.[9]

[9]*Snowden* was a civil rights complaint concerning alleged unconstitutional conduct by voting officials in refusing to certify the plaintiff as the winner of an election. This Court declared: "The lack of

General, conclusionary allegations unsupported by facts have always been considered insufficient to establish a civil rights violation.[10] Instead, the plaintiff "must set forth the claim in a manner which, taking the pleaded facts as true, states a claim [violation of a constitutional right] as a matter of law." *Nickens v. White,* 536 F.2d 802, 803 (8th Cir. 1976).[11] See *Bounds v. Smith,* 430 U.S. 817, 825 (1977). Such words as "intentional," "willful," "reckless," "knowing," and "malicious," without supporting facts, are merely conclusionary allegations which are insufficient to establish a claim. *Cameron v. Whirlwindhorse,* 494 F.2d 110, 114 (8th Cir. 1974), *Curtis v. Everette,* 489 F.2d 516, 521 (3d Cir. 1973), cert. denied, 396 U.S. 861.[12]

any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets 'willful' and 'malicious' applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust, and oppressive administration of the laws of Illinois." 321 U.S. at 10.

[10] *Rotolo v. Borough of Charleroi,* 532 F.2d 920, 922-23 (3d Cir. 1976); *Anderson v. Sixth Judicial Dist. Court,* 521 F. 2d 420, 420-21 (8th Cir. 1975); *Albany Welfare Rights Org. Day Care Center v. Schreck,* 463 F.2d 620, 623 (2d Cir. 1972), cert. denied, 410 U.S. 944; *Place v. Shepherd,* 446 F.2d 1239, 1244 (6th Cir. 1971); *Fletcher v. Hook,* 446 F.2d 14, 16 (3d Cir. 1971); *Jewell v. City of Covington,* 425 F.2d 459, 460 (5th Cir. 1970), cert. denied, 400 U.S. 929; *Finley v. Rittenhouse,* 416 F.2d 1186, 1187 (9th Cir. 1969); *Negrich v. Hohn,* 379 F.2d 213, 215 (3d Cir. 1967); *Powell v. Workmens Comp. Bd. of State of New York,* 327 F.2d 131, 137 (2d Cir. 1964); *Hoffman v. Halden,* 268 F.2d 281, 294 n. 15 and text (9th Cir. 1959), overruled on other grounds, *Cohen v. Norris,* 300 F.2d 24, 29-30 (9th Cir. 1962); see *Duncan v. Nelson,* 466 F.2d 939, 943 (7th Cir. 1972), cert. denied, 409 U.S. 894.

[11] Accord, *Fine v. City of New York,* 529 F.2d 70, 73 (2d Cir. 1975); *Raper v. Lucey,* 488 F.2d 748, 752 (1st Cir. 1973); *Padilla v. Lynch,* 398 F.2d 481, 482 (9th Cir. 1968).

[12] The conclusionary nature of the plaintiffs' allegations herein cannot be excused under the rationale of *Haines v. Kerner,* 404 U.S. 519, 520 (1972). The complaints herein were not only prepared by an attorney, but have even been redrafted once by counsel. Hence the *Haines* remission is inapplicable. *Allen v. Aytch,* 535 F.2d 817, 921-22 n. 21 (3d Cir. 1976); *Williams v. Cannon,* 370 F.Supp. 1243, 1245 (N.D. Ill. 1974), app'l dismissed, 515 F.2d 512 (7th Cir. 1975).

The Court of Appeals has taken plaintiffs' allegations of "intentional" conduct at face value. However, the label which the plaintiff attaches to his claim is not determinative of its nature. *Johnson v. United States,* 547 F.2d 688, 691 (D.C. Cir. 1976); *Ritchie v. U.M.W.,* 410 F.2d 827, 832 (6th Cir. 1969); *Aktiebolaget Bofors v. United States,* 194 F.2d 145, 148 (D.C. Cir. 1951); *Bercy Industries, Inc. v. Mechanical Mirror Works, Inc.,* 279 F.2d 428, 429 (S.D.N.Y. 1968). Instead, the court should have looked beyond the literal language to ascertain the essential nature of the claimed cause of action by examination of the factual allegations. *United States v. Neustadt,* 366 U.S. 696, 703-04 (1961); *Schilling v. Rogers,* 363 U.S. 666, 676 (1960).[13]

> "More detail is required than a plaintiff's bald statement 'that he has a valid claim of some type,' and courts do 'not accept conclusionary allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened. . . .'" *Kadar Corp. v. Milbury,* 549 F.2d 230, 233 (1st Cir. 1977).

See *Wood v. Holiday Inns, Inc.,* 508 F.2d 167, 172 n. 1 (5th Cir. 1965).

Looking to the essential factual allegations of the amended complaints, petitioners' alleged liability is based upon their conduct in requiring prisoners to work upon machines which were known to be dangerous and unsafe,

[13] In *Schilling,* this Court counselled that "[S]uch conclusionary allegations may not be read in isolation from the complaint's factual allegations." *Ibid.* The Courts of Appeal have always looked to the facts set out in the complaint to determine the nature of the cause of action. *Fitch v. United States,* 513 F.2d 1013, 1015 (6th Cir. 1975), cert. denied, 423 U.S. 866; *Blanchard v. Terry & Wright, Inc.,* 331 F.2d 596, 599 (2d Cir. 1964), cert. denied, 379 U.S. 855; *Hall v. United States,* 274 F.2d 69, 71 (10th Cir. 1959); *Aktiebolaget Bofors v. United States,* 194 F.2d 145, 148-49 (D.C. Cir. 1951).

in not providing adequate training, in not using the machines for their intended purposes, in improper maintenance, in failure to provide adequate protective devices, and in failing to respond to reports of unsafe machines. Plaintiffs did not plead "intentional" tort at all. As Prosser notes:

> "[T]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classed as an intentional wrong." W. Prosser, Torts § 8, p. 30 (2d ed. 1955).

The Restatement similarly distinguishes intentional from negligent conduct:

> "In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced. It is not enough that the act itself is intentionally done and this, even though the actor realizes or should realize that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless, but unless he realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable. . . ." Restatement of Torts § 13, Comment (d), pp. 29-30 (1934).

This distinction between "intentional" and "negligent" torts has been recognized by this Court. *Procunier v. Navarette*, ... U.S. ....., ..., 98 S.Ct. 855, 862 (1978). The so-called "intentional" conduct of petitioners herein did not meet the

standard set out in Prosser's text, the Restatement, or that recognized by this Court. At most, the alleged conduct constituted negligence.

As the district court properly held, the plaintiffs' allegations set out what is essentially an industrial-accident claim[14] based upon concepts of negligence. In an almost identical case involving a federal prisoner, the court described the conduct of prison officials as negligence. *Tindall v. Moore,* 417 F.Supp. 548, 548-52 (D. Ga. 1976). Failure to install adequate protective devices was described as negligence in *O'Neil v. United States,* 450 F.2d 1012, 1015 (3d Cir. 1971). Requiring a prisoner to work on a grossly-defective machine was held to be negligence in *Kent v. Prosse,* 265 F.Supp. 673, 674-75 (W.D. Pa. 1967), aff'd *sub nom. Kent v. Prasse,* 385 F.2d 406 (3d Cir. 1967). Similarly, lack of adequate supervision over reformatory-school inmates using defective or dangerous machinery has been described as negligence by a New York court. *Oakley v. State,* 329 N.Y.S.2d 537, 539 (App. Div. 1972).

Another means of determining the true nature of a complaint is to compare those facts with how similar allegations have been historically construed. *Johnson v. United States,* 547 F.2d 688, 692 (D.C. Cir. 1976). In the federal setting, such allegations have been considered to establish a negligent tort. *O'Neil v. United States,* 450 F.2d 1012, 1015 (3d Cir. 1971); *Kent v. Prosse,* 265 F.Supp. 673, 674-75 (W.D. Pa. 1967) aff'd *Kent v. Prasse,* 385 F.2d 406 (3d Cir. 1967); *Tindall v. Moore,* 417 F.Supp. 548, 548-52 (D. Ga. 1976). Under California law—and California's law is typical of state decisions in this area—such allegations would establish a claim of negligence. See *Hall v. Burton,*

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[14]It is interesting to note that even plaintiffs characterized their injuries as "accidents." See *Butler* ¶ 9, 13; *Galligher* ¶ 10.

201 Cal.App.2d 72, 80-81 (1962) (furnishing defective machinery to employee with knowledge of defect, failure to inspect or maintain machines); *Guyer v. Sterling Laundry Co.*, 171 Cal. 761, 764-65 (1916) (no protective device on machine); *Larsen v. Bloemer*, 156 Cal. 752, 756-57 (1909) (failure to install or inspect protective devices on machinery); *Quinn v. Electric Laundry Co.*, 155 Cal. 500, 506-07 (1909) (failure to adequately instruct inexperienced operator).

If this Court's decision in *Procunier v. Navarette*, ... U.S. ...., ..., 98 S.Ct. 855, 862, was meant to confine liability under the Civil Rights Act of 1871 to cases of intentional tortious conduct breaching constitutional rights, then the decision of the Court of Appeal effectively emasculates *Procunier*. To paraphrase *Johnson v. United States*, 547 F.2d 688, 691-92 (D.C. Cir. 1976), a litigant should not be able to circumvent the Act by the simple expedient of drafting in terms of "intentional tort" a claim which in reality constitutes negligence. Or as another court has ruled, "The Court . . . [should not be] bound by the conclusion of the pleader and will not permit the essential character of the suit to be disguised or distorted by the 'artful drafting of a complaint.'" *Edelman v. F.H.A.*, 251 F.Supp. 15, 717 (E.D.N.Y. 1966) (footnote omitted), aff'd, 382 F.2d 594 (2d Cir. 1967). But this is exactly what the opinion of the Court of Appeals permits.

B. Conduct Which had been Previously Judicially Declared Not to be a Constitutional Tort Cannot Serve as the Basis for Holding Petitioners Monetarily Liable

In *Procunier v. Navarette*, ... U.S. ...., ..., 98 S.Ct. 855, 860-62 (1978), this Court held that prison officials cannot be held liable in damage actions based upon conduct which

did not, at the time the conduct occurred, violate any clearly-established constitutional right. Insofar as the Court of Appeals has found petitioners liable under the allegations of the amended complaints, that court has completely disregarded the *Procunier v. Navarette* decision.

In their complaints, the plaintiffs allege that defendants (petitioners herein) "required them to work in a prison furniture factory[15] and did so with the knowledge that the machines upon which the prisoners were to work were hazardous, dangerous and unsafe, and that prison officials did not provide proper training, utilize the machines for their intended purposes, properly maintain the machines, provide adequate protective devices, or adequately respond to reports of unsafe machines. Insofar as the "forced labor" aspect of these complaints is concerned, the United States Constitution permits the states to require prisoners to work (U.S. Const., 13 Amend.), and the Court of Appeals had previously held that "There is no federally protected right of a state prisoner not to work while imprisoned after conviction. . . ." *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963), cert. denied, 375 U.S. 915. And the *only* reported cases dealing with prison-staff liability for injuries to prisoners suffered while being required to work in prison industries have held that there is no cause of action under the Civil Rights Act. *Mertz v. Pinto*, 343 F.Supp. 374, 375 (D.N.J. 1971), aff'd, 459 F.2d 1041 (3d Cir. 1972); *Kent v. Prasse*, 385 F.2d 406, 407-08 (3d Cir. 1967). Similarly, the Court of Appeals *itself* had previously held that no cause of action was stated by a California prisoner who allegedly lost 3 fingers in a prison metal press which prison officials knew to be unsafe. *Brown v. Procunier*,

[15]But see note 7, *supra* at p. . . .

No. 73-1044 (9th Cir., February 26, 1974) (reprinted as Appendix E).[16]

In *Procunier v. Navarette,* .... U.S. ...., 98 S.Ct. 855, 860-61, this Court noted that there was some conflict in various federal decisions which rendered the existence of a constitutional right, with the violation of which those defendants were charged, questionable. This Court went on to say:

> "As a matter of law, therefore, there was no basis for rejecting the immunity defense on the ground that petitioners knew or should have known that their alleged conduct violated a constitutional right. Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as in good faith.'" *Id.,* .... U.S. at ...., 98 S.Ct. at 861-62.

In view of the uniformity in reported decisions establishing that petitioners' purported conduct did *not* violate any constitutional rights, and the conformity of the unreported Ninth Circuit decision with the reported rule, it is simply impossible to square the holding of the Court of Appeals with this Court's decision in *Procunier v. Navarette.*

II
THERE IS A CONFLICT IN THE CIRCUITS AND AMONG PANELS OF THIS CIRCUIT.

This petition should be granted to resolve a conflict in the circuits. In this decision, the Court of Appeals has held that

[16]The fact that the decision in *Brown v. Procunier* was unpublished is of no significance herein. Raymond K. Procunier, the "Procunier" of *Brown v. Procunier,* was the Director of Corrections and in charge of all California prisons when petitioners' conduct allegedly occurred, and hence it cannot reasonably be urged that petitioners were unaware of the *Brown v. Procunier* decision. As a matter of fact, it is the same Mr. Procunier who is listed as a defendant in both the *Butler* and *Galligher* complaints.

allegations charging that petitioners required prisoners to work upon machines which were known to be dangerous and unsafe, without providing adequate training, without using the machines for their intended purposes, without maintaining the machines properly or installing protective devices, and that petitioners ignored reports of unsafe machines, stated a claim of "intentional" tort under the Civil Rights Act of 1871. This decision is in direct conflict with *Mertz v. Pinto,* 343 F.Supp. 374, 375 (D.N.J. 1971), aff'd, 459 F.2d 1041 (3d Cir. 1972), which holds that prison officials cannot be held liable under the Civil Rights Act for injuries to a prisoner who was allegedly forced to work around a meat grinder despite his susceptibility to dizzy spells and was injured when falling into the grinder. It is in direct conflict with *Kent v. Prasse,* 385 F.2d 406, 407-08 (3d Cir. 1967), which holds that prison officials cannot be held liable for injuries to a prisoner hurt while operating a machine known to be defective. It is in direct conflict with *Kent v. Prosse,* 265 F.Supp. 673, 674-75 (W.D. Pa. 1967), aff'd *sub nom. Kent v. Prasse,* 385 F.2d 406 (3d Cir 1967), which holds that requiring a prisoner to work on a grossly-defective machine is unactionable negligence. And insofar as it determines that the conduct alleged is "intentional" rather than negligence, it is in direct conflict with *Tindall v. Moore,* 417 F.Supp. 548, 548-52 (D. Ga. 1976), which holds that virtually identical allegations pertaining to a federal prisoner constitute negligence.

But even more confusing is the situation in this circuit; where one panel (*Brown v. Procunier,* reprinted in Appendix E) has held that forcing a prisoner to work on a defective industrial machine is *not* a basis for a Civil Rights claim, while the instant panel has held to the contrary. Since both decisions are unpublished, they are of equal weight as precedent or guidance as constitutional directives. Those

defendants or potential defendants who are prison administrators on a state-wide level, and counsel who must advise them, are thus faced with an intolerable quandary: determination of constitutional rights and liabilities by Russian roulette.

CONCLUSION

Contrary to traditional tort concepts and the decisions of every federal court which has touched upon the subject, the Ninth Circuit has construed a prisoner damage suit based upon what is essentially an industrial accident as an actionable intentional tort under the Civil Rights Act. This construction, based solely upon plaintiffs' use of conclusionary words such as "willful" or "knowingly" in the complaint, promises to completely undermine *Procunier v. Navarette* insofar as that decision holds that negligent conduct does not create a Civil Rights action. In apparent defiance of the *Procunier v. Navarette* requirement of "prior notice," the Ninth Circuit has held petitioners liable for conduct which every previous reported or unreported case has found not actionable. For these reasons, we respectfully urge that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California
September 12, 1978.

EVELLE J. YOUNGER
Attorney General of the State of California
JACK R. WINKLER
Chief Assistant Attorney General—
Criminal Division
EDWARD P. O'BRIEN
Assistant Attorney General
JOHN T. MURPHY
Deputy Attorney General
CHARLES R. B. KIRK
Deputy Attorney General
Attorneys for Petitioners.

(Appendices Follow)

Appendices

Appendix A

DO NOT PUBLISH

United States Court of Appeals
for the Ninth Circuit

No. 75-2969

Theodore Butler,
Plaintiff-Appellant,
v.
Louis S. Nelson, et al.,
Defendants,

Billy Galligher, John Beltran, and Joseph Bohall, et al.,
Plaintiffs-Appellants,
v.
Louis S. Nelson, et al.,
Defendants.

[Filed March 6, 1978]

Appeal from the United States District Court
for the Northern District of California

MEMORANDUM

Before: CARTER and HOFSTEDLER, Circuit Judges, and SMITH,* District Judge.

Plaintiffs filed complaints in federal district court alleging defendants had violated their civil rights by forcing them to work in the prison furniture factory under danger-

*Hon. Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

ously unsafe conditions resulting in serious injuries. After one mistrial the case was assigned to a new judge who dismissed the case pursuant to Fed. Rules Civ. Proc. 12(b)(6) for failure to state a cause of action for which relief can be granted. The district judge concluded the complaints alleged no more than ordinary negligence which he felt was not sufficient to permit plaintiffs to invoke federal jurisdiction under the Civil Rights Acts, 42 U.S.C. §§ 1981 et seq.[1]

Complaints should not be dismissed for failure to state a cause of action "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Although these consolidated complaints were inartistically drawn, they alleged, *inter alia*, that defendants maliciously, recklessly, knowingly and willfully violated appellants' right against cruel and unusual punishment by subjecting them to forced labor under conditions resulting in the maiming of their hands. Such allegations, unless so lacking in factual support as to be frivolous, adequately state a cause of action under 42 U.S.C. § 1983. Based on the record, the district judge simply could not say that plaintiffs could prove no set of facts which would bring them within the purview of the act. We reverse.

[1]Negligent conduct is not actionable under 42 U.S.C. § 1983. The Ninth Circuit had held that the deprivations of an individual's federally insured rights need not be purposeful to be actionable under section 1983. *Navarette v. Enomoto*, 536 F.2d 277, 281 (9 Cir. 1976). But that decision was reversed by the United States Supreme Court *sub nom. Procunier v. Navarette*, ... U.S. ...., 46 U.S.L.W. 4144 (February 22, 1978). We do not face this question because the complaints at issue cannot be fairly construed to allege merely ordinary negligence.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 75-2969

Theodore Butler,
Plaintiff-Appellant,
vs.
Louis S. Nelson, et al.,
Defendants.

Billy Galligher, John Beltran, and Joseph Bohall, et al.,
Plaintiffs-Appellants,
vs.
Louis S. Nelson, et al.
Defendants.

[Filed July 28, 1978]

ORDER

Before: CARTER, HUFSTEDLER, and SMITH, Judges.

The panel in the above entitled case voted unanimously to deny the petition for rehearing.

Judge Carter and Judge Smith recommended the rejection of the suggestion for rehearing en banc, and Judge Hufstedler voted to reject the suggestion for rehearing en banc.

The petition for rehearing en banc was circulated to all active judges and no judge has voted for a rehearing en banc.

IT IS ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix C

Salle S. Soladay
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Telephone: 457-9351
Attorney for Plaintiff

In the United States District Court
for the Northern District of California

No. C-70 436 WTS

Theodore Butler, individually and on behalf of all others similarly situated,
Plaintiff,

vs.

Louis S. Nelson, Raymond K. Procunier, Paul L. Lemon, George P. Smith, W. Cox, Melvin L. James and Does One through Fifteen, inclusive,
Defendants.

[Filed September 5, 1972]

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR DAMAGES

Plaintiff complains of defendants and each of them as follows:

I. JURISDICTION

1. Jurisdiction of this court is invoked pursuant to 28 U.S.C. Sections 1331, 1343 and 2201 and 2202. This is

a suit authorized by 42 U.S.C. Sections 1981, 1983, 1985 and 1988 to redress the deprivation under color of state law of rights, privileges and immunities secured by the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution. This is also a proceeding for declaratory judgment as to plaintiff's right to be free from such deprivation by defendants acting under color of state law, for injunctive relief and for damages both compensatory and punitive.

II. PARTIES

2. Plaintiff is a citizen of the United States and a resident of the State of California. At the time the action arose the plaintiff was a prisoner of the State of California, incarcerated at San Quentin Prison, and is now on parole upon orders of the defendants and defendant RAYMOND K. PROCUNIER.

3. Defendants RAYMOND K. PROCUNIER, Director of Corrections, LOUIS S. NELSON, Warden of San Quentin Prison, PAUL L. LEMON, Corrections Industry Manager at San Quentin Prison, GEORGE P. SMITH, Superintendent of the Furniture Factory at San Quentin Prison, W. COX, Assistant Superintendent of the Furniture Factory at San Quentin Prison, and MELVIN L. JAMES, Foreman of the Furniture Factory at San Quentin Prison, and all officers and/or employees of the State of California. Defendants are being sued individually and in their official capacity.

4. The true and/or full names and/or capacities of the remaining defendants, sued herein as DOES ONE through FIFTEEN inclusive, are unknown to plaintiff who therefore sues said defendants by such fictitious names. Plaintiff will request leave to amend this complaint to show such true names and/or capacities when the same have been ascertained.

5. At all times mentioned herein defendants were officers and/or employees of the State of California and were acting within the course and scope of their employment and acting under color of the laws of the State of California.

III. STATEMENT OF CLAIM

6. Plaintiff was compelled by defendants to work in whatever job defendants assigned him. Plaintiff had no choice as to whether or not he would work; refusal to do so resulted in both immediate disciplinary action and prospective adverse consequences. The immediate disciplinary action includes a twenty-three hour a day lock-up for an indeterminate period of time extending to years in many cases, and loss of the sole source of earnings while in prison confinement. The prospective adverse consequence of refusing to work is a "write-up" in the inmate's file regarding the disciplinary action, which can ultimately mean possible increase in a prisoner's sentence when his file is reviewed by the Adult Authority.

7. Plaintiff was compelled by defendants to work in the furniture factory at San Quentin Prison, at machines that were dangerous, hazardous and unsafe and defendants compelled plaintiff to work at these dangerous, hazardous and unsafe machines with full knowledge of the dangerous, hazardous and unsafe condition of the machines thereby inflicting cruel and unusual punishment on plaintiff, depriving plaintiff of equal protection of the laws and denying plaintiff the right to due process of law. Defendants

maintained these dangerous, hazardous and unsafe conditions by failing and refusing to properly train those chosen to work in this facility, by failing and refusing to use the machines in a manner and for purposes for which they were designed, by failing and refusing to see that the machines were maintained and repaired by professional and competent maintenance personnel, by failing and refusing to provide protective devices on the machines, by failing and refusing to replace worn and defective equipment, by failing and refusing to establish a safety committee which would insure a safer working environment in the future factory, by refusing to heed the warnings and complaints of inmate-employees even after witnessing numerous and repeated injuries to prisoners and plaintiff occurring because of the dangerous, hazardous and unsafe machines and the dangerous, hazardous and unsafe working conditions.

8. As a direct and proximate result of being compelled by defendants to work under these dangerous, hazardous and unsafe conditions, which defendants who direct and manage this million dollar operation knew or should have known to be unsafe, plaintiff received serious injuries, to wit:

(a) Plaintiff BUTLER was assigned to the furniture factory during his six years confinement at San Quentin Prison, and during that time observed the conditions as set forth above. During June or July, 1969, plaintiff BUTLER was injured in the course of operating a hand-jointer, a machine designed to prepare boards for fitting in a joint. This machine was not designed to process "junk-ends," *i.e.*, small warped and knotty pieces of wood and further the only guard on this machine is open to the operator's hand once he begins sending the wood pieces through the machine

instead of having the proper protective device which would prevent such injuries. Plaintiff BUTLER was required to send "junk ends" through the jointer even though defendants knew that this machine was dangerous, hazardous and unsafe when used for this purpose with this guard as several prisoners had been injured on numerous occasions when they were required to send "junk ends" through this machine and had informed defendants of the dangerous, hazardous and unsafe nature of such use of this machine. As a result of forcing plaintiff to perform this work on the jointer, he received an injury when the tip of the blade caught the little finger of his left hand.

(b) After his return to the furniture factory defendants again maliciously and recklessly forced plaintiff to work on the hand-jointer and required plaintiff to send "junk-ends" through the machine without a proper protective guard. In order to insure that the wood would be properly graded before being sent through the machine, plaintiff BUTLER attempted to protect himself by doing his own grading. However, defendant JAMES, foreman, upon discovering this, ordered plaintiff to stop doing his own grading and to confine his activities to the above described operation of the hand-jointer only. As a direct and proximate consequence of defendants' orders plaintiff BUTLER on November 26, 1969, was injured a second time, a serious injury resulting in the loss of the ring finger at the first joint. Extreme sensitivity in the remainder of that finger presently inhibits plaintiff from full use of his left hand.

9. Plaintiff further alleges that defendant and each of them owed a duty of care to plaintiff. Defendants exhibited a reckless disregard of the safety of plaintiff and thereby breached their duties to plaintiff. Defendants had actual knowledge of the dangers likely to ensue from a failure to furnish plaintiff with safe and proper machines and by

maintaining these dangerous, hazardous and unsafe conditions. That knowledge notwithstanding, defendants maliciously, recklessly, knowingly and willfully compelled plaintiff to subject himself to severe injuries and loss of limb by forcing plaintiff to work on such dangerous, hazardous and unsafe machines and under dangerous, hazardous and unsafe working conditions; by ignoring the hazardous working conditions which defendants knew existed in the furniture factory; and by refusing to heed the warnings of plaintiff and of other inmates and of agents, servants and employees of defendants regarding those conditions and the numerous injuries caused thereby. Defendants' actions caused the accidents hereinbefore alleged to have occurred, with attendant injuries and damages, thereby denying plaintiff's right to be free from cruel and unusual punishment, denying him equal protection of the law, and denying him due process of law.

10. In the alternative, defendants' acts and omissions hereinbefore alleged constituted gross negligence, in that defendants failed to furnish safe and fit equipment or adequate supervision or assistance for the task which they ordered plaintiff to perform. Defendants should reasonably have known such equipment, supervision, and assistance to be necessary to prevent the likelihood of severe personal injury in the performance of such task. As a direct and proximate result of such gross negligence, the accidents hereinbefore alleged occurred, with attendant injuries and damages. Accordingly, defendants are liable to plaintiff for their gross negligence under circumstances establishing a duty not to be negligent in that plaintiff was subjected to cruel and unusual punishment, denied equal protection of the law and denied due process of the law.

11. Plaintiff alleges that defendants' intentional, affirmative and malicious conduct in compelling plaintiff to work under these hazardous conditions constitutes an infliction of cruel and unusual punishment, violative of the Eighth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment.

12. Plaintiff, after being seriously injured on the occasion described herein, had to walk approximately the distance of two city blocks, from the furniture factory to the prison medical facility. On arrival there at about 8 or 9 a.m. he was sent up to the second level. There he was told that they had no lights and no doctor. After waiting close to 45 minutes his finger was wrapped in gauze, and he was sent back downstairs. Finally, at about 12 noon a doctor by the name of Simmons arrived, performed some surgery on plaintiff's finger and confined him to the hospital for one day. Upon his release from the hospital, plaintiff returned to the job site, but the foreman, seeing that he could not do any job because of the condition of his hand, sent him to his cell. There he remained for four months. Upon request for sick pay plaintiff was informed by defendant SMITH that since he had never been put on "medically unassigned" status he could only receive four weeks sick pay. Upon examination of his finger, Doctor Simmons advised plaintiff that a second operation should be done to remove part of the fingernail which the doctor had neglected to remove during the initial operation.

13. Plaintiff alleges that on the occasion of the second accident he was acutely in need of urgent and timely medical attention and that the long delay in receiving same, as well as the inadequate surgical operation as indicated above, amounted to indifference on the part of prison officials and was tantamount to a refusal to grant medical

care. Such intentional and wilful refusal constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution as applicable to the states by the Fourteenth Amendment of the United States Constitution.

14. Plaintiff alleges that by directing and managing the operation of the furniture factory at San Quentin in a manner which gave rise to extremely hazardous working conditions, and then by denying timely and adequate medical care to those who are injured while being compelled to work under such conditions, defendants wilfully and intentionally conspired together to deny and deprive plaintiff of rights guaranteed to him under the United States Constitution.

15. Plaintiff has been subjected because of the above recited acts to the deprivation under color of state law of rights, privileges and immunities secured by the due process clause of the Fourteenth Amendment, in that refusal to work under these conditions would have resulted in severe punishment being imposed upon him without even the slightest imposition of any of the elements of procedural due process.

16. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for declaratory judgment and injunction is his only means of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable injury from defendants' policies and practices in the operation of the furniture factory at San Quentin Prison as set forth herein.

WHEREFORE, plaintiff respectfully prays that this court enter judgment granting plaintiff:

1. A declaratory judgment that defendants' acts, policies, and practices complained of herein constitute a conspiracy to violate plaintiff's rights secured by the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution as applied to the states by the Fourteenth Amendment of the United States Constitution and secured by the due process clause of the Fourteenth Amendment of the United States Constitution.

2. A preliminary and permanent injunction enjoining defendants from compelling plaintiff to work under conditions which expose him to serious bodily injury and maiming and death and from punishing plaintiff for refusing to work under such conditions.

3. Compensatory damages for plaintiff in the amount of ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00) and punitive damages for plaintiff in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00).

4. The costs of this suit.

5. Such other and further relief as this court may deem just and proper.

Dated: September 1, 1972.

SALLE S. SOLADAY

Salle S. Soladay
Attorney for Plaintiff

Appendix D

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In the United States District Court
for the Northern District of California

No. C-71 1323 WTS

Billy Galligher, Joseph Lewis Bohall, LeRoy Taylor and John Raymond Beltran, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

Raymond K. Procunier, Louis S. Nelson, Paul L. Lemon, George P. Smith, W. Cox, Melvin L. James and Does One through Fifteen, inclusive,
Defendants.

[Filed September 1, 1972]

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR DAMAGES

Plaintiffs complain of defendants and each of them as follows:

I. JURISDICTION

1. Jurisdiction of this court is invoked pursuant to 28 U.S.C. Sections 1331, 1343 and 2201 and 2202. This is a

suit authorized by 42 U.S.C. Sections 1981, 1983 and 1985 and 1988 to redress the deprivation under color of state law of rights, privileges and immunities secured by the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution. This is also a proceeding for declaratory judgment as to plaintiffs' rights to be free from such deprivation by defendants acting under color of state law, for injunctive relief and for damages both compensatory and punitive.

II. PARTIES

2. Plaintiffs are citizens of the United States and residents of the State of California. At the time the action arose the plaintiffs were prisoners of the State of California, incarcerated at San Quentin State Prison, Tamal, California, and are now all in custody at San Quentin Prison or have been transferred to other Department of Corrections facilities or are on parole upon orders of the defendants RAYMOND K. PROCUNIER.

3. Defendants RAYMOND K. PROCUNIER, Director of the California Department of Corrections, LOUIS S. NELSON, Warden of San Quentin Prison, PAUL L. LEMON, Corrections Industry Manager at San Quentin Prison, GEORGE P. SMITH, Superintendent of the Furniture Factory at San Quentin Prison, W. COX, Assistant Superintendent of the Furniture Factory at San Quentin Prison, and MELVIN L. JAMES, Foreman of the Furniture Factory at San Quentin Prison, are all officers and/or employees of the State of California. Defendants are being sued individually and in their official capacity.

4. The true and/or full names and/or capacities of the remaining defendants, sued herein as DOES ONE through FIFTEEN inclusive, are unknown to plaintiffs who therefore sue said defendants by such fictitious names. Plaintiffs will request leave to amend this complaint to show such true names and/or capacities when the same have been ascertained.

5. At all times mentioned herein defendants were officers and/or employees of the State of California and were acting within the course and scope of their employment and acting under color of the laws of the State of California.

III. CLASS ACTION

6. Plaintiffs bring this action on behalf of themselves and all other present or past inmates of San Quentin Prison who are or who have been similarly situated, in accord with Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class; and plaintiffs will adequately and fairly represent the interests of the class.

IV. STATEMENT OF CLAIMS

7. All prisoners, including the plaintiffs, have been and continue to be compelled by defendants to work in whatever job they are assigned. They have no choice as to whether or not they will work; refusal to do so results in both immediate disciplinary action and prospective adverse consequences. The immediate disciplinary action includes a twenty-three hour a day lock-up for an indeterminate period of time extending to years in many

cases, and loss of the sole source of earnings while in prison confinement. The prospective adverse consequence of refusing to work is a "write-up" in the inmate's file regarding the disciplinary action, which can ultimately mean possible increase in a prisoner's sentence when his file is reviewed by the Adult Authority.

8. Plaintiffs were compelled by defendants to work in the furniture factory at San Quentin Prison, at machines that were dangerous, hazardous and unsafe and defendants compelled plaintiffs to work at these dangerous, hazardous and unsafe machines with full knowledge of the dangerous, hazardous and unsafe condition of the machines thereby inflicting cruel and unusual punishment on plaintiffs, depriving plaintiffs of equal protection of the laws and denying plaintiffs the right to due process of law. Defendants maintained these dangerous, hazardous and unsafe conditions by failing and refusing to adequately and directly supervise the inmate plaintiffs, by failing and refusing to properly train those chosen to work in this facility, by failing and refusing to use the machines in a manner and for purposes for which they were designed, by failing and refusing to see that the machines are maintained and repaired by professional and competent maintenance personnel, by failing and refusing to provide protective devices on the machines, by failing and refusing to replace worn and defective equipment, by failing and refusing to establish a safety committee which would insure a safer working environment in the furniture factory, by refusing to heed the warnings and complaints of inmate-employees even after witnessing numerous and repeated injuries occurring because of the dangerous, hazardous and unsafe machines and the dangerous, hazardous and unsafe working conditions.

9. As a direct and proximate result of being compelled by defendants to work under these dangerous, hazardous and unsafe conditions, which defendants who direct and manage this million dollar operation knew or should have known to be unsafe, plaintiffs received serious injuries, to wit:

(a) Plaintiff GALLIGHER was assigned to operate a hand-jointer, a machine designed to prepare boards for fitting in a joint. It is not designed to process "junk-ends," *i.e.*, small warped and knotty pieces of wood. Plaintiff GALLIGHER was ordered to send "junk-ends" through the jointer, even though defendants knew that another inmate had previously been injured on two occasions while using the jointer in this manner. On May 11, 1970, plaintiff GALLIGHER was seriously injured while using the machine in this manner. The injury resulted in the loss of the middle finger of his left hand at the first joint. Thereafter, plaintiff GALLIGHER complained in writing to the officials of the prison regarding the danger of this practice. Upon his release from the hospital plaintiff GALLIGHER was again assigned to the same job of sending junk-ends through the same machine. On July 10, 1970, plaintiff GALLIGHER was injured a second time, losing the entire fourth finger of his left hand.

(b) Plaintiff BOHALL was assigned to operate an Oliver brand power table saw, which was not equipped with a safety device. Although plaintiff BOHALL protested the lack of safety device to the authorities he was ordered to operate the saw, notwithstanding its defects. On June 23, 1970, plaintiff BOHALL was seriously injured while operating this saw, when the saw kicked a board back into his left hand and groin. Plaintiff BOHALL's left thumb was ripped open and the knuckle was displaced. He has not

regained the use of his left thumb. Upon release from the prison hospital plaintiff BOHALL was again assigned to the same machine. No safety device had been installed. On July 27, 1970, plaintiff BOHALL was injured a second time, resulting in removal of part of his right thumb. He will never regain full use of his right thumb.

(c) Plaintiff TAYLOR was assigned to operate a Three Drum Sander. It was not equipped with a safety device. On May 19, 1970, while operating the sander plaintiff TAYLOR sustained an injury resulting in the amputation of the middle and ring fingers of his left hand at the first joint.

(d) Plaintiff BELTRAN was assigned to operate a radial saw, which was not equipped with any safety device. On August 12, 1970, while operating the saw plaintiff BELTRAN received permanent disfiguration and handicap when ligaments in the middle and ring finger of his right hand were severed.

10. Plaintiffs further allege that defendants and each of them owed a duty of care to each plaintiff. Defendants exhibited a reckless disregard of the safety of plaintiffs and thereby breached their duties to plaintiffs. Defendants had actual knowledge of the dangers likely to ensue from a failure to furnish plaintiffs with safe and proper machines and by maintaining these dangerous, hazardous and unsafe conditions. That knowledge notwithstanding, defendants maliciously, recklessly, knowingly and willfully compelled plaintiffs to subject themselves to severe injuries and loss of limb by forcing plaintiffs to work on such dangerous, hazardous and unsafe machines and under dangerous, hazardous and unsafe working conditions; by ignoring the hazardous working conditions which defendants knew existed in the furniture factory; and by refusing to heed the warnings of plaintiffs and of other inmates and of agents, servants

and employees of defendants regarding those conditions and the numerous injuries caused thereby. Defendants' actions caused the accidents hereinbefore alleged to have occurred, with attendant injuries and damages, thereby denying plaintiffs' right to be free from cruel and unusual punishment, denying them equal protection of the law, and denying them due process of law.

11. In the alternative, defendants' acts and omissions as hereinbefore alleged constituted gross negligence, in that defendant failed to furnish safe and fit equipment or adequate supervision or assistance for the task, which they ordered plaintiffs to perform. Defendants should reasonably have known such equipment, supervision and assistance to be necessary to prevent the likelihood of severe personal injury in the performance of such task. As a direct and proximate result of such gross negligence, the accidents hereinbefore alleged occurred, with attendant injuries and damages. Accordingly, defendants are liable to plaintiffs for their gross negligence under circumstances establishing a duty not to be negligent in that plaintiffs were subjected to cruel and unusual punishment, denied equal protection of the law and denied due process of the law.

12. Plaintiffs allege that defendants' intentional, affirmative and malicious conduct in compelling plaintiffs to work under these hazardous conditions constitutes an infliction of cruel and unusual punishment, violative of the Eighth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment.

13. Plaintiffs have been subjected because of the above recited acts to the deprivation under color of state law of rights, privileges and immunities secured by the due process clause of the Fourteenth Amendment, in that refusal to work under these conditions would have resulted

in severe punishment being imposed upon them without even the slightest imposition of any of the elements of procedural due process.

14. Plaintiffs allege that by directing and managing the operation of the furniture factory at San Quentin Prison in a manner which gave rise to extremely dangerous, hazardous and unsafe working conditions as seen from the overt acts hereinbefore specified defendants willfully and intentionally conspired together to deny and deprive plaintiffs of rights guaranteed them under the Constitution of the United States.

15. Plaintiffs and members of plaintiffs' class on behalf of whom this complaint is brought have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for declaratory judgment and injunction is their only means of securing adequate relief. Plaintiffs and members of the plaintiffs' class are now suffering and will continue to suffer irreparable injury from defendants' policies and practices in the operation of the furniture factory at San Quentin Prison as set forth herein.

WHEREFORE, plaintiffs respectfully pray that this court enter judgment granting plaintiffs:

1. A declaratory judgment that defendants' acts, policies, and practices complained of herein constitute a conspiracy to violate plaintiffs' rights and the rights of the members of plaintiffs' class secured by the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution as applied to the States by the Fourteenth Amendment of the United States Constitution and secured by the due process clause of the Fourteenth Amendment of the United States Constitution.

2. A preliminary and permanent injunction enjoining defendants from compelling plaintiffs and members of

plaintiffs' class to work under conditions which expose them to serious bodily injury and maiming and death and from punishing plaintiffs for refusing to work under such conditions.

3. Compensatory damages for plaintiff GALLIGHER in the amount of FIFTY THOUSAND DOLLARS ($50,000.00) and punitive damages for plaintiff GALLIGHER in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00).

4. Compensatory damages for plaintiff BOHALL in the amount of FIFTY THOUSAND DOLLARS ($50,000.00) and punitive damages for plaintiff BOHALL in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00).

5. Compensatory damages for plaintiff TAYLOR in the amount of FIFTY THOUSAND DOLLARS ($50,000.00) and punitive damages for plaintiff TAYLOR in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00).

6. Compensatory damages for plaintiff BELTRAN in the amount of FIFTY THOUSAND DOLLARS ($50,000.00) and punitive damages for plaintiff BELTRAN in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00).

7. The cost of suit, and

8. Such other and further relief as this court may deem just and proper.

Dated: September 1, 1972.

SALLE S. SOLADAY

Salle S. Soladay
Attorney for Plaintiffs

Appendix E

In the United States Court of Appeals
for the Ninth Circuit

No. 73-1044

Willie Brown,
Plaintiff-Appellant,
v.
Raymond Procunier, et al.,
Defendant-Appellee.

[Filed February 26, 1974]

Appeal from the United States District Court
for the Eastern District of California

MEMORANDUM

Before: KOELSCH, WRIGHT and SNEED,
Circuit Judges.

The appellant, a prisoner in California State Prison at Folsom, sued his jailers under 42 U.S.C. §§ 1983, 1985 alleging that he lost three fingers while operating a defective metal press after he had previously been injured and had warned his supervisors that the press was defective. He also alleged that prisoners generally were required to operate machinery known by prison officials to be unsafe. He asked for monetary, declaratory, and injunctive relief for himself and on behalf of the class of prioners similarly situated.

The district court dismissed the action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The district court erred by neither disclaiming reliance on affidavits sub-

mitted by the defendants nor treating the motion as one for summary judgment under Rule 56 and affording the plaintiff an opportunity to submit controverting affidavits. *See Carter v. Stanton*, 405 U.S. 669 (1972); *Costen v. Pauline's Sportswear*, 391 F.2d 81 (9th Cir. 1968); *Erlich v. Glasner*, 374 F.2d 681 (9th Cir. 1967). Nevertheless, we have reviewed the complaint without the affidavits, and conclude that it fails to state a claim and should be dismissed pursuant to Rule 12(b)(6).

In support of his § 1983 claim, plaintiff alleges what is essentially a single instance of an intentional tort. Such an allegation does not support a § 1983 caim. *Williams v. Field*, 416 F.2d 483 (9th Cir. 1969); *Kent v. Prasse*, 385 F.2d 406 (3d Cir. 1967) (considering facts nearly identical to those presented here).

Plaintiff also alleges that it is a widespread practice for prisoners to be required to work on machinery known by prison officials to be unsafe. We need not decide whether negligent conduct, sufficiently widespread, could support a claim under § 1983. It is sufficient to note that plaintiff has alleged no facts which support his conclusion that such conduct is in fact widespread. Indeed, he alleges no facts aside from his own case.

In support of his § 1985 claim, plaintiff alleges merely that defendants conspired against him to commit the acts alleged in support of the § 1983 claim. The allegation is entirely conclusory, and plaintiff alleges no concrete facts from which a conspiracy can be inferred.

The dismissal of the complaint by the district court is affirmed. We note that, unlike the plaintiff in *Kent*, Brown is not without a remedy. He can sue his jailers under § 844.6 of the California Government Code.

AFFIRMED.